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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	CC Docket No. 94-129
	)	
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers.	)	

THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES' OPPOSITION TO PETITIONS FOR RECONSIDERATION OF THE SECOND REPORT AND ORDER

Pursuant to 47 CFR § 1.429(f), the National Association of State Utility Consumer Advocates (NASUCA)[1] herewith respectfully opposes the requests for reconsideration of the Commission's Second Report and Order (Order) filed in this docket by the following parties: AT&T Corp. (AT&T); Excel Telecommunications, Inc. (Excel); Frontier Corporation (Frontier); GTE Service Corporation (GTE); MediaOne Group (MediaOne); RCN Telecom Services, Inc. (RCN); and Sprint Corporation

[1] NASUCA is an association of 42 consumer advocate offices in 39 states and the District of Columbia. Our members are designated by laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

(Sprint).[2] Notice of these petitions for reconsideration was published in the Federal Register on June 8, 1999. The portions of the petitions for reconsideration that NASUCA opposes are identified herein.[3]

I. Those who argue that the Commission has no authority to order absolution from slammers' charges are in error.

Sprint "requests that the Commission reconsider its decision to absolve subscribers who claim to have been slammed of the obligation to pay for all calls made within 30 days after the alleged unauthorized conversions are said to have occurred." Sprint at 1. Sprint's rationale is based on a fundamental misreading of § 258 of the Act.

With regard to the statute, Sprint states that

> Section 258 of the Act sets forth specific measures ... which balance the interests of consumers and their authorized carriers .... Section 258 envisions (1) that the customer would pay for the services received while on the unauthorized carrier's network at his authorized carrier's rates and would receive all premiums to which he would otherwise be entitled; (2) that the authorized carrier would receive the money collected by the slamming carrier from the consumers; and (3) the slamming carrier in addition to turning over all money collected from the slammed customer would have to pay to the LEC all charges for converting the customer to its services and for returning the customer to his authorized carrier.

Sprint at 5-6 (footnote omitted). How Sprint derives these "specific measures" from the terse statutory requirement that the slammer "that collects charges for telephone

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[2] NASUCA filed a petition for reconsideration of the Order on March 18, 1999. NASUCA's petition requested reconsideration of the Commission's decision to absolve subscribers of payment for slammed service only if the subscriber has not paid the bill for the slammed service, and then only for 30 days from the slam. NASUCA also sought reconsideration on the lack of provision for customer notice of the complex process created by the Commission's rules, which complexity stemmed largely from the limitations on absolution contained in the rules.

[3] The implementation of the Commission's rules has been stayed by the D.C. Circuit Court of Appeals. That stay does not effect the merits of the Petitions for Reconsideration opposed herein.

exchange service or telephone toll service shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation..." is very difficult to fathom. None of Sprint's "specifications" are dictated by the Act.

AT&T argues that "Congress, in mandatory language established a remedy requiring unauthorized carriers to pay over the proceeds of such transactions to authorized carriers, and the Commission is not authorized to substitute its contrary judgment." AT&T at 5. The Commission is in fact precisely carrying out Congress' remedy: Where the customer has paid the unauthorized carrier, the rules require the payment to be transferred to the authorized carrier. 47 C.F.R. § 64.1100. But the Act does *not* require the customer to pay the unauthorized carrier. Where there has been no payment, there is no transfer. Sprint argues that the rules "turn the Section 258 mechanism on its head, based on the happenstance of whether the customer has remitted any payments for the services provided by the authorized carrier." Sprint at 6. That "happenstance" is the central trigger to § 258; the rules recognize that the obligation accrues only when the subscriber has paid.

Sprint then claims that under the Commission's absolution provisions, "the authorized carrier receives no compensation for lost revenues as a result of the slam ... so that the slammed customer can receive what amounts to a windfall." *Id.* Yet it is the authorized carrier that would receive a windfall under Sprint's formulation -- and the Commission's, as argued by NASUCA in its Petition for Reconsideration -- by receiving revenues for service not provided! Further, under Sprint's notion that remedies are

limited to those in the statute, it should be clear that the lack of compensation to the authorized carrier when the subscriber has not paid comes directly from the statute.

Frontier also challenges the Commission's absolution remedy, arguing that "Section 258(b) contains the Congressionally-sanctioned remedy and Congress did not provide for absolution as a remedy." Frontier at 4. In the first place, Frontier's position is based on a misreading of the Commission's Order. Frontier claims that "the Commission has decided to absolve consumers from any liability for charges resulting from unauthorized [carrier] changes for 30 days after the unauthorized change has occurred." *Id.* at 3. Yet the Commission's rules actually absolve customers only when they have not paid the slammer's bill. Where the customer has paid, there is no absolution. 47 C.F.R. § 64.1100(d).

Frontier's position derives from its belief that the Commission's 30-day absolution -- where the customer has not paid -- is in conflict with § 258(b). Given that the Act deals only with situations where the customer *has* paid, Frontier's objection makes no sense.[4] Where the bill has not been paid, eliminating the 30-day absolution improves the lot of neither the slammer nor the authorized carrier.

Frontier claims that "the absolution remedy, in fact, is in direct conflict with the specific provisions of section 258(b)." Frontier at 8. Yet the best that Frontier can come up with to support its claim of direct conflict is a citation to Commissioner Furchtgott-Roth's dissent, which discusses what "Section 258 *seems* to anticipate" and that "the

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[4] In fact, as argued in NASUCA's Petition for Reconsideration, total absolution of the customer from payment for service from the slammer is not in conflict with the Act; § 258(b) creates a liability of the slammer that is independent of any subscriber responsibility for payment to the slammer *or* the authorized carrier.

adoption of consumer absolution *may* act to discourage the authorized carrier from policing those practices...." See Frontier at 8-9, quoting Dissenting Opinion at 1 (emphasis added). This is hardly a direct conflict sufficient to justify overturning the absolution rule.[5]

Sprint (at 12-13) and AT&T (at 9) argue that absolution as a remedy is out of proportion to the harm to the subscriber. NASUCA would suggest that giving revenues to the authorized carrier *where that carrier has provided no service and incurred no expense* is far more disproportionate. Yet the carriers would have the customer pay the authorized carrier for all the service it did not provide. See AT&T at 5.

II. The "no-fault" provisions of the Commission's rules are appropriate.

Frontier (at 9-13) and Sprint (at 9-10) take issue with what Frontier calls the Commission's "no-fault" standard. Frontier claims that the Commission's rules penalize "innocent mistakes." Frontier at 10.

Yet § 258 does not limit its remedy to instances where the carrier's conduct is willful or intentional. Section 258(a) provides that "[n]o telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." And § 258(b) imposes a penalty on "[a]ny telecommunications carrier that violates the verification procedures described in

[5] Frontier's detailed discussion (at 3-8) of principles of statutory interpretation depends on its erroneous assumption that the rules conflict with the statute.

subsection (a)...." Neither provision is limited to cases in which the violation was willful or intentional.

Keyed to Sprint's claim that "innocent" carriers are punished is Sprint's further argument that "the inconvenience and hardship experienced by a particular customer has little or no relation to the customer's bill for the first 30 days of service received." Sprint at 12. Given Sprint's insistence that the Commission lacks the power to order any absolution (see above), it is not surprising that Sprint does not propose an alternative mechanism that would bear a close relation to the inconvenience and hardship experience by a particular customer. It is difficult to imagine any generic mechanism that could be implemented by rule that would match the remedy to the harm to a specific customer. More importantly, as the Commission states, the first purpose of absolution is to deprive the slammer of the economic incentive to slam. Order ¶ 18.[6]

III. The absolution rules will not lead to an increase in fraud; any increase in slamming complaints is fully justified.

Sprint argues that the Commission's mechanism will "have the perverse effect of leading to more rather than fewer claims of slamming." Sprint at 12. In fact, the Commission noted that one purpose of the 30-day absolution window was to give subscribers increased incentives to scrutinize their bills. Order ¶ 20. All things being equal, increased scrutiny should properly lead to more claims of slamming. Sprint then concludes -- from the increased number of claims -- that absolution "will not lead to a

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[6] Sprint's argument that "the largest 'windfalls' will be paid precisely to those [large] knowledgeable customers who are likely to be least troubled by slamming" (Sprint at 13) may be true in absolute dollar terms, but ignores the fact that for a residential customer the impact of slamming may be a relatively larger portion of a household budget.

reduction in the number of alleged unauthorized conversions." Sprint at 12. The logic here is baffling: Contrary to Sprint's argument, the Commission's expectation -- an entirely reasonable one -- is that increased scrutiny by subscribers combined with increased penalty for the slammers will discourage unauthorized conversions. Order ¶ 20.

Behind Sprint's position is the two notions that the Commission's rule gives the authorized carrier -- established as the judge of slamming -- incentive to rule against the carrier submitting the supposedly unauthorized change, and that customers will have incentives to claim that they have been slammed. Sprint at 11-12. With regard to the first point, the involvement of the authorized carrier in judging whether a slam has occurred is an artifact of the Commission's combined decision 1) to limit the absolution period to thirty days, and 2) to require customers to pay the authorized carrier for service provided by the slammer. As discussed in NASUCA's petition for reconsideration (at 16), the better course is for the executing carrier -- having less of an interest in the outcome -- to determine whether a slam has occurred.

With regard to Sprint's second point, as previously noted, to the extent that slams are occurring, it is in the public interest for those slams to be reported, so that slammers are caught. Sprint states that "the prospect of obtaining 30 days free service will likely entice a perhaps not insignificant number of consumers who switch carriers to allege that they have been slammed." Sprint at 12; see also AT&T at 12. GTE, for its part, claims that the Commission's rules "create a huge new opportunity for toll fraud." GTE at 3. In order for this to work under the Commission's rules, this "not insignificant number" of subscribers will have to first, switch carriers, filing out the paperwork and otherwise following the requirements that the "switched-to" carrier will impose for verification;

second, not pay the bill for the service; and third, depend on the previously-authorized carrier to ignore the evidence of a proper switch presented by the supposedly-unauthorized carrier.[7] This possibility -- NASUCA submits, an extremely remote one -- is not enough to reject the requirement of absolution imposed by the Commission's rules. (Neither is it grounds to reject the less-limited absolution proposed in NASUCA's Petition for Reconsideration.)

Neither Sprint nor GTE acknowledge the alternatives to absolution. First, the subscriber could be required to pay the slammer for service. That would legitimize the slammer's action, and leave the only disincentive the previously-authorized carrier's difficult-to-enforce § 258(b) efforts. Or the subscriber could be required to pay the authorized carrier for service that that carrier never provided. That provides a windfall for the authorized carrier, and does not leave the subscriber whole as Congress intended. In fact, both alternatives harm consumers.

IV. The Commission should not preempt state regulation.

Excel (at 9-10) and RCN (at 9) both argue that the Commission should reconsider its decision not to preempt state regulation. They allege that "the costs to carriers to comply with a patchwork of inconsistent federal and state regulations could be exorbitant, while accruing little benefit to consumers." Excel at 9; see also RCN at 9. In the first place, neither carrier cites any authority allowing the Commission to preempt state regulation on the basis that it would increase carrier's costs.

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[7] Ignoring such evidence would, of course, subject the previously-authorized carrier to a likely successful § 208 complaint by the supposedly unauthorized carrier.

Equally importantly, the premise of the argument -- that state regulation will not benefit consumers -- is faulty. If state regulators, having direct experience with subscribers' carrier change problems (perhaps due to a single carrier's operations in that state), determine that additional protections are needed for those consumers, how is the Commission or the carriers to question that finding?

Excel's and RCN's argument, that state regulation increases carriers' costs, in the end would preempt all state regulation, leaving only federal regulation to solve consumers' problems. This is neither contemplated by nor authorized by the Act: § 258(a) specifically states that "[n]othing in this section shall preclude any State commission from enforcing [verification] procedures with respect to intrastate services."

V. Conclusion

For the reasons set forth herein, the Commission should deny the Petitions for Reconsideration filed by AT&T, Excel, Frontier, GTE, MediaOne, RCN, and Sprint, with respect to the issues set forth herein.

Respectfully submitted,

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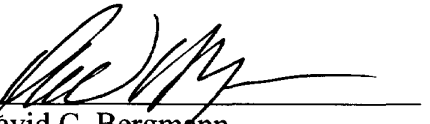

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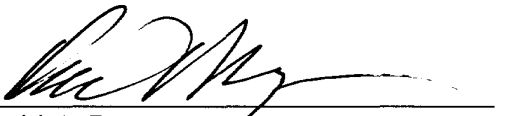
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Opposition To Petitions For Reconsideration Of The Second Report And Order By The National Association Of State Utility Consumer Advocates was served by first class mail, postage prepaid, or hand-delivered on the parties identified below this 22nd day of June, 1999.



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